Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 02-79

In The

Supreme Court of the United States

JACQUELINE J. MILLER-WAGENKNECHT,

Petitioner,

v.

CITY OF MUNROE FALLS AND BETTE LYONS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

JOHN T. MCLANDRICH
Counsel of Record
PAUL J. CRISTALLO
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

Counsel for Respondents City of Munroe Falls and Bette Lyons, in her official capacity

AMIE L. BRUGGEMAN, Esq.
Law Director for City of Munroe Falls
43 Munroe Falls Avenue
Munroe Falls, Ohio 44262

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner Jacqueline Miller-Wagenknecht is a tax protester who failed to timely file tax returns with the City of Munroe Falls for tax years 1994 and 1995. Regarding her failure to pay taxes for 1994, the proceedings against Ms. Miller-Wagenknecht resulted in a plea agreement whereby Ms. Wagenknecht agreed to pay taxes to the City of Munroe Falls. Petitioner then failed to timely pay her 1995 Munroe Falls taxes. The subsequent prosecution ended with Ms. Miller-Wagenknecht being found not guilty. Thereafter, Ms. Miller-Wagenknecht brought suit against City of Munroe Falls and the City's Tax Administrator, Ms. Bette Lyons, for malicious prosecution, abuse of process and equal protection violations. A unanimous jury found the Respondents not liable on all of Petitioner's claims.

The Petitioner raises the following issues:

I. Whether a tax administrator or a municipal entity is guilty of malicious prosecution, abuse of process and equal protection violations when they institute proceedings against an individual for failing to pay her taxes in light of the facts that, a) the individual filled out city forms indicating she is a resident of the municipality; b) the municipality sent repeated correspondence to the individual requesting that she pay her local taxes and/or respond to inquiry; c) the individual indicates she is not going to pay her taxes and to "talk to my lawyer;" and d) the individual enters into a plea agreement whereby she agrees to pay taxes to the local municipality and then fails to timely pay her taxes the following year.

QUESTIONS PRESENTED – Continued

II. Whether the trial court erred when it instructed the jury on the applicable law for malicious prosecution and probable cause.

III. Whether a general denial in an answer, which is not recanted but is later established, can be the basis for judgment against a civil defendant, and further, if said issue can be raised for the first time on appeal at the state Supreme Court level.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
I. Clarification of the Record	1
Reasons for Denying the Writ	3
I. Petitioner has not articulated a compelling reason to justify discretionary review by this Court.	3
A. Petitioner confuses a plaintiff's burden of proof in a civil malicious prosecution case with a Prosecutor's burden of proof in a criminal proceeding	3
B. The Court did not err in its charge to the jury regarding the applicable law of malicious prosecution and probable cause...	6
C. Petitioner's proposition that a failure to recant a general denial which is subsequently established by the trial court entitles a plaintiff to judgment is erroneous....	8
Conclusion	9

TABLE OF AUTHORITIES

Page

CASES

Bostic v. Connor, 37 Ohio St. 3d 144, 524 N.E. 2d 881 (1988) 8

Bryan v. United States, 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed. 2d 197 (1998) 4

Carruba v. Transit Casualty Co., 443 F.2d 260 (6th Cir. 1971) 7

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (1991) 3, 4, 5, 6, 7

Cleveland Electric Illuminating Co. v. Astorhurst Land Co., 18 Ohio St. 3d 268, 480 N.E. 2d 794 (1985) 7

Grandsky v. Sperry Rand Corp., 489 F.2d 502 (6th Cir. 1973) 7

In re: Terence J. Meyers, 196 F.3d 622 (6th Cir. 1999) 4

Ohio Farmer's Ins. Co. v. Cochran, 104 Ohio St. 427, 135 N.E. 537 (1922) 7

Pergola v. Pennsylvania Road Company, 311 F.2d 837 (6th Cir. 1963) 6

Perry v. Adjustable Awning, Inc., 117 Ohio App. 486, 192 N.E. 2d 672 (9th Dist. 1962) 6

Reichert v. Ingersoll, 18 Ohio St. 3d 220, 480 N.E. 2d 802 (1985) 7

Saucier v. Katz, 121 S.Ct. 2151, 533 U.S. 194, 150 L.Ed. 2d 272 (2001) 5

Trussell v. General Motors Corp., 53 Ohio St. 3d 142, 559 N.E. 2d 732 (1990) 5

TABLE OF AUTHORITIES – Continued

Page

Wagenheim v. Alexander Grant & Co., 19 Ohio App. 3d 7, 482 N.E. 2d 955 (10th Dist.1983)..... 7

Walczesky v. Horvits Co., 26 Ohio St. 2d 146, 269 N.E. 2d 844 (1971)..... 7

RULE

Supreme Court Rule 10 3

RESPONDENTS CITY OF MUNROE FALLS AND BETTE LYONS' BRIEF IN OPPOSITION TO JACQUELINE MILLER-WAGENKNECT'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Judicial District accurately set forth the pertinent facts related to Miller-Wagenknecht's claims. [Pet., App. C, pp. 22-40.] Briefly stated, this case involves Miller-Wagenknecht's failure to pay taxes to City of Munroe Falls for tax years 1994 and 1995. Following Petitioner's 1994 prosecution, which resulted in a plea agreement, and following Petitioner's 1995 prosecution, which resulted in a finding of not guilty, Petitioner filed her civil suit alleging malicious prosecution, abuse of process and equal protection violations. The trial resulted in an unanimous jury finding in favor of the Respondents on all counts.

I. CLARIFICATION OF THE RECORD

Petitioner incorrectly indicates that this case arises out of her "efforts to comply" with local tax laws. Similar to Petitioner's decision to ignore her obligation to pay taxes, Petitioner's statement of the case ignores the fact that she was repeatedly mailed letters indicating her need to pay taxes to the City of Munroe Falls. [Pet., App. C, pp. 23-24, 28-29.] Petitioner also failed to include that following her failure to pay local taxes for 1994, she entered into a plea bargain whereby she acknowledged her requirement to pay local taxes. [Pet., App. C, pp. 23-24, 28-29.] Also, while Petitioner acknowledges that she sent a request for an extension to file her tax returns for the tax year 1995, she fails to include the fact that her request for

an extension was untimely and did not have the proper attachments. [Pet., App. C, pp. 23-24, 28-29.] Indeed, following these attempts to have Petitioner pay her taxes, the Respondent City of Munroe Falls made further attempts to contact her regarding her tax delinquency for the second year in a row. [Pet., App. C, pp. 23-24, 28-29.] The evidence before the trial court demonstrated that following Petitioner's second annual failure to timely pay taxes, she refused to respond to inquiry by the City of Munroe Falls and its Tax Administrator, Ms. Bette Lyons. [Pet., App. C, pp. 23-24, 28-29.]

Petitioner also states that her "good faith belief" that she did not have to pay City of Munroe Falls taxes was based on the fact that she was not "domiciled" in Munroe Falls. The record below belies Petitioner's assertion. It is admitted that Petitioner purchased a home at 174 Cheltenham Lane in the City of Munroe Falls on August 31, 1994. On September 28, 1994, Petitioner executed a water contract with the City of Munroe Falls for her residence. On October 30, 1994, Petitioner submitted a Residence Information Sheet with the Income Tax Department for the City of Munroe Falls stating that she started residency in the City of Munroe Falls on October 10, 1994. [Pet., App. C, pp. 23-24, 28-29.]

It is, however, worth pointing out that Petitioner makes reference to the fact that she told the City of Munroe Falls that she was not going to pay taxes based on her belief that she was not required to file Munroe Falls taxes, and further, that if the City of Munroe Falls had additional questions, they could talk with her attorney. [Pet. 4.]

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her appeal to this Court.

A. PETITIONER CONFUSES A PLAINTIFF'S BURDEN OF PROOF IN A CIVIL MALICIOUS PROSECUTION CASE WITH THE PROSECUTOR'S BURDEN OF PROOF IN A CRIMINAL PROCEEDING.

The thrust of Petitioner's argument for this Court to accept jurisdiction is that pursuant to *Cheek v. United States,* 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (1991), the government may not prosecute citizens for failure to pay their taxes where that failure was not intentional, but rather, arose from a genuine misunderstanding of a tax provision. Since 1991, tax protestors have sought to construe *Cheek* as standing for the principal that the government must establish a taxpayer willfully failed to pay her taxes before instituting criminal proceedings. Respondents submit that *Cheek* does not stand for this principle.

As argued below, the *Cheek* case involved a criminal/federal tax prosecution. Specifically at issue was the interpretation of the word "willful" as it appeared in the

federal tax code. This Court determined that the defendant in *Cheek* was entitled to a jury instruction at his criminal trial regarding his good faith belief in failing to file or pay his taxes. *Id.* The *Cheek* case does not have blanket applicability to all "failure to file or pay taxes" cases in the criminal *or* civil context.

Importantly, this Court has limited the applicability of *Cheek*. In *Bryan v. United States*, 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed. 2d 197 (1998), this Court distinguished the "willful" analysis of *Cheek* based on the fact that the *Cheek* prosecution involved "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." Moreover, the interpretation of the term "willful" applies expressly to provisions of the U. S. tax code. Other Courts have similarly limited *Cheek* to its facts. (See, e.g. *In re: Terence J. Meyers*, 196 F.3d 622 (6th Cir. 1999), distinguishing *Cheek* and finding that the lower court properly granted summary judgment. The Court dismissed plaintiff-appellant's arguments that he did not honestly believe he needed to pay taxes.)

The matter before this Court does not involve the U.S. tax code, but rather, the City of Munroe Falls tax ordinance. The Munroe Falls tax ordinance is not a "highly technical" tax provision. Indeed, the tax ordinance for the City of Munroe Falls is very straight forward. Munroe Falls Ordinance Section 181.99(A)(1) and (11) provides: "Any person who * * * (f)ails, neglects or refuses to make any return or declaration required by this Chapter * * * shall be guilty of a misdemeanor." Munroe Falls Ordinance 181.05 requires each taxpayer to file a return on or before April 30 for the previous tax year. Accordingly the *Cheek* case is simply inapplicable.

Petitioner moved to the City of Munroe Falls and submitted various forms acknowledging her residency. Petitioner then simply sought to avoid paying taxes by declaring that she was not "domiciled" in Munroe Falls and, therefore, was not going to pay any local taxes. Following a plea agreement arising out of her failure to pay taxes for the tax year 1994, Petitioner again failed to pay her Munroe Falls taxes for tax year 1995.

Assuming *arguendo* the rationale in *Cheek* had some applicability to the matter at issue, *Cheek* sets forth the requisite standards for a criminal prosecution and the matter herein is civil. To prevail on a claim of malicious prosecution in the state of Ohio, a plaintiff must provide evidence of each element of malicious prosecution: (1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motors Corp.*, 53 Ohio St. 3d 142, 559 N.E. 2d 732 (1990). Here, Petitioner focuses on the City's failure to prove her intent regarding her failure to pay local taxes. Throughout this lawsuit, Petitioner has confused the burden necessary to sustain a conviction for tax evasion with plaintiff's burden to prevail in a malicious prosecution claim.

"Probable cause" is an analysis of the arresting party's reasonable belief, considering the facts and circumstances known to them at that time, as to the guilt of the party to be charged. *Saucier v. Katz*, 121 S.Ct. 2151, 533 U.S. 194, 150 L.Ed. 2d 272 (2001). Accordingly, a person instituting criminal proceedings need not have evidence which establishes a criminal defendant's guilt beyond a reasonable doubt prior to bringing those charges; rather, the charging party merely needs a reasonable belief based on the facts and circumstances presented at that time. *Id.* Accordingly,

in Ohio, a plaintiff in a malicious prosecution claim must prove more than his or her acquittal, he or she must prove malice and a lack of probable cause. *Pergola v. Pennsylvania Road Company,* 311 F.2d 837, 838 (6th Cir. 1963). Yet no action for malicious prosecution will lie if probable cause to arrest and prosecute exists, even when express malice is proved. *Perry v. Adjustable Awning, Inc.*, 117 Ohio App. 486, 487, 192 N.E. 2d 672 (9th Dist. 1962).

It is undisputed that Petitioner failed to respond to Respondents' repeated inquiries and attempts to have Petitioner pay her local taxes. It is also undisputed that Petitioner entered into a plea agreement whereby she agreed to pay Munroe Falls taxes. When considering Petitioner's conduct in light of the express terms of the Munroe Falls tax ordinance, probable cause existed to charge Petitioner with failing to pay her taxes. Indeed, assuming *arguendo Cheek v. United States*, *supra*, is applicable to this matter, the Petitioner's admitted conduct evidences she *willfully* failed to pay her taxes.

B. THE COURT DID NOT ERR IN ITS CHARGE TO THE JURY REGARDING THE APPLICABLE LAW OF MALICIOUS PROSECUTION AND PROBABLE CAUSE.

Petitioner's second argument in support of jurisdiction fails as it is dependent upon the flawed reasoning of Petitioner's first argument. Petitioner wrongly asserts that Respondents needed to establish her intent, or "willfulness," in failing to pay her taxes prior to the institution of criminal proceedings. Based upon this incorrect premise, Petitioner alleges that the trial court erred when it failed to give the jury a corresponding instruction on

Respondents' failure to establish Petitioner's intent or "willfulness" in failing to pay her taxes.

As stated above, *Cheek, supra,* simply does *not* stand for the principle that state and local officials need to establish an individual's intent to not pay taxes prior to instituting criminal proceedings. Accordingly, the trial court did not err in giving Petitioner's erroneous instruction.

In Ohio, the standard on appeal for a court's charge to the jury is whether the charge, taken as a whole, fairly and accurately submits the issues and applicable law to the jury. *Grandsky v. Sperry Rand Corp.*, 489 F.2d 502, 503-504 (6th Cir. 1973). Indeed, a jury charge must be considered as a whole, and a reviewing court must determine whether the jury charge misled the jury in a matter materially affecting the complaining party's substantial rights. *Ohio Farmer's Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922), paragraph six of the syllabus; *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 482 N.E. 2d 955 (10th Dist. 1983). A judge does not commit error because he or she fails to use language contained in a request, so long as the instruction given is accurate and sufficient. *Carruba v. Transit Casualty Co.*, 443 F.2d 260, 264 (6th Cir. 1971). A failure to give a proposed jury instruction is subject to a "plain error" review. *Reichert v. Ingersoll*, 18 Ohio St. 3d 220, 480 N.E. 2d 802 (1985). The plain error doctrine is used in civil matters only under exceptional circumstances to prevent a manifest miscarriage of justice. *Id.*; see also, *Cleveland Electric Illuminating Co. v. Astorhurst Land Co.,* 18 Ohio St. 3d 268, 275, 480 N.E. 2d 794 (1985). Lastly, a trial court can properly reject proposed jury instructions it considers confusing. *Walczesky v. Horvitz Co.*, 26 Ohio St. 2d 146, 151, 269 N.E.

2d 844 (1971). A trial court can also reject an instruction if, within its discretion, it feels the instruction is redundant or immaterial. *Bostic v. Connor*, 37 Ohio St. 3d 144, 524 N.E. 2d 881 (1988).

In the matter at issue, the trial court's jury instructions, taken as a whole, accurately set forth the controlling law on the applicable issues, including malicious prosecution and probable cause.

The trial court properly instructed the jury as to probable cause and malicious prosecution. [Pet., App. C, pp. 26-27.] As stated by the Court of Appeals for the Ninth Judicial District, "Although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense. The trial court need not discuss the final points of *mens rea*." [Pet., App. C, p. 26.]

A unanimous jury found that probable cause existed to charge Petitioner with failure to pay her taxes, and accordingly, no error occurred. This Honorable Court need not exercise jurisdiction over Petitioner's Writ.

C. PETITIONER'S PROPOSITION THAT A FAILURE TO RECANT A GENERAL DENIAL WHICH IS SUBSEQUENTLY ESTABLISHED BY THE TRIAL COURT ENTITLES A PLAINTIFF TO JUDGMENT IS ERRONEOUS.

As an initial matter, Respondents request this Court not exercise jurisdiction over this matter based on the fact that Petitioner's third assertion, as set forth above, was not raised until briefs were submitted to the Ohio Supreme Court.

Second, Petitioner's argument that a general denial to a claim, which is eventually established, must result in judgment for plaintiffs is unsupported by the common law and the civil rules. Respondents submit that a rule whereby an "unrecanted," general denial results in judgment for plaintiff would be a drastic and unnecessary alteration of the civil rules. Accordingly, as Petitioner cites no precedent or rationale for her position, Respondents submit that this Court need not exercise jurisdiction to entertain such matters.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN T. MCLANDRICH
Counsel of Record
PAUL J. CRISTALLO
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

Counsel for Respondents City of Munroe Falls and Bette Lyons, in her official capacity